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No. 08-448

IN THE

Supreme Court of the United States

CABLE NEWS NETWORK, INC. ET AL.,
Petitioners,

v.

CSC HOLDINGS, INC. AND CABLEVISION SYSTEMS CORP.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF

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Cablevision insists that its own conduct in operating the RS-DVR service cannot directly infringe Petitioners' § 106 rights because that conduct merely substitutes for "time-shifting" that would be lawful if done by subscribers on equipment in their own homes. But the Second Circuit's embrace of that fallacious reasoning is a powerful reason for granting – not denying – review. The question under § 106 of the Copyright Act is whether *Cablevision's* conduct directly violates Petitioner's exclusive rights. Exonerating a commercial enterprise based on what its customers do would gut copyright law – as exemplified by the Second Circuit's unprecedented constriction of the reproduction and public performance rights in this very case.

Hence, Cablevision's mantra that subscribers use its RS-DVR service in the same way they use in-home VCR or DVR devices is a red herring. With respect to Cablevision's own conduct, the two situations are completely different. When a subscriber has a set-top VCR or DVR, Cablevision provides traditional cable service by transmitting its *licensed* real-time stream of programming, and the subscriber autonomously uses the device in the home for all copying and playback. For its RS-DVR service, in contrast, Cablevision splits its transmission into a second, unlicensed stream; makes two buffer copies of all programming from the unlicensed stream; exercises its discretion to choose which program channels it will copy and replay when requested by subscribers; makes and stores copies of entire programs when requested, on massive servers

at central facilities that it staffs and operates around the clock for this purpose; and transmits performances of the programs it has copied from those central facilities to subscribers' homes on demand. Pet. 8-11; Pet. App. 51a-61a. This conduct is nothing like "the sale of an article of commerce" appropriately analyzed as a question of secondary liability. *See Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 440 (1984). Cablevision's conduct here comprises the very acts § 106 reserves exclusively to copyright owners – copying and transmission of programs. Even the Second Circuit acknowledged that "[i]n this respect, RS-DVR more closely resembles a VOD service." Pet. App. 6a.

Only by ignoring what Cablevision does could the Second Circuit condone Cablevision's brazen usurpation of Petitioners' reproduction and public performance rights. That outcome is particularly intolerable because Cablevision's unlicensed exploitation of Petitioners' works jeopardizes the value of the *licensed* video-on-demand services that are made available on cable with Petitioners' authorization.

By the same token, only a singularly result-driven focus premised on a misreading of *Sony* can explain the Second Circuit's remarkable holdings that the permanent copies Cablevision creates in response to user requests are not made by Cablevision; that the buffer copies Cablevision makes in order to create the permanent copies are not reproductions; and that Cablevision is not

publicly performing programs when it transmits performances of them to subscribers on demand. As the Petition demonstrated, and Cablevision fails to refute, those rulings drastically narrow the exclusive rights of reproduction and public performance in ways that conflict with the statutory language and its interpretation by other Circuits and the Copyright Office.

Nor is there any doubt that the Second Circuit's decision threatens harms far beyond the confines of this case. The outpouring of support for the Petition from an array of amici with no direct interest in Cablevision's service – copyright owners, other business interests, and scholars – makes perfectly clear that this is a case of genuine national importance. Those briefs (and the many amicus briefs on both sides below) reflect the reality recognized by everyone with any stake in the vitality of the nation's content and information industries: the decision below has sweeping implications in the digital age, particularly for automated and on-demand services. It stands out among recent cases that have "narrowly construed ... [copyright owners'] exclusive rights ..., thus putting into doubt their efficacy in the digital environment. ... [T]he Second Circuit's ... decision ... could substantially eviscerate the reproduction and public performance rights." Jane C. Ginsburg, *Recent Developments in US Copyright Law – Part II, Caselaw: Exclusive Rights on the Ebb?*, at 1, Revue Internationale du Droit

d'Auteur (forthcoming Jan. 2009) (hereinafter, *Recent Developments*).[1]

The Court should not accept Cablevision's invitation to stand by while the RS-DVR service and the further harmful repercussions of this flawed decision become an entrenched reality. Automated digital services are revolutionizing copyright industries today. Pet. 6-7. The Second Circuit's decision provides a blueprint for new automated businesses seeking windfall profits by providing copyrighted works to consumers without the long-accepted obligation to obtain a license. Once these parasitic business models become widespread, they will be virtually impossible to uproot by post-hoc judicial decisions.[2] Lower courts and industry leaders need a definitive ruling on the law now, as the boundaries of permissible automated services are being drawn. Particularly given the existing divisions of authority as to each question presented, review is essential, before even greater harms materialize. *See* Professors' Amicus Br. 4-9.

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[1] Citations are to the manuscript at http://ssrn.com/abstract=1305270.

[2] Here a page of history is a worth a volume of logic. Napster inflicted devastating harm on the recording industry within months of its initial launch, and its entrenched peer-to-peer progeny continue to inflict such harms years later, despite *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

I. The Second Circuit's Misinterpretation of *Sony* Merits Review.

The Second Circuit reasoned that the lawfulness of Cablevision's conduct must be analyzed under principles of secondary infringement, rather than direct liability, because the subscriber conduct here superficially resembles the time-shifting held to be fair use in *Sony*. Pet. App. 20a-21a, 23a-26a. That reasoning inverts the relationship between direct and secondary liability and creates a gaping loophole in copyright remedies against commercial services whose own conduct is infringing when the conduct of their customers assertedly is not.

Cablevision suggests the Second Circuit did not misread *Sony* in this way. But the court unambiguously relied on *Sony* when it rejected direct liability due to the perceived similarity of Cablevision's customers to VCR users, and invoked *Sony* as "buttress[ing]" its "refusal to find Cablevision directly liable." *Id.* That was no accident. Cablevision's lead argument to the Second Circuit was that it would be an "end-run" around *Sony* to impose direct liability on Cablevision if *Sony* protected its subscribers' conduct as fair use. Appellants' Br., *Cartoon Network LP v. CSC Holdings Inc.*, No. 07-1480- CV(L), at 16-18, 25-26 (2d Cir. filed May 30, 2007).

Cablevision's "end-run" argument – and the Second Circuit's acceptance of it – presupposes that if its customers' use of its service were noninfringing, that would preclude direct liability against Cablevision itself. That conflicts with settled law.

"Third party conduct" is "wholly irrelevant in an action for direct infringement." *Sony*, 464 U.S. at 446. Accordingly, an accused direct infringer may not stand in the shoes of its customers or assert their noninfringing use to bar liability based on its own infringing conduct. *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1389 (6th Cir. 1996) (en banc).

The Second Circuit's misunderstanding of *Sony* as favoring secondary over direct copyright liability eviscerates the core protections of copyright law. Paradigmatic copyright pirates – businesses that copy or transmit programs for profit without a license – are direct infringers because their own conduct violates the § 106 exclusive rights. Yet, if their customers merely buy and watch DVDs or view streamed transmissions, and thus do not commit predicate acts of direct infringement under § 106, these infringing businesses would typically not be secondarily liable.

Hence, the Second Circuit and Cablevision are flat wrong to insist that "where *illegal* copying occurs, secondary-liability doctrines 'stand[] ready to provide adequate protection.'" Opp. 20 (quoting Pet. App. 24a). Secondary liability presupposes that *someone else* is a direct infringer. Thus, it provides no protection at all against a commercial copyright pirate's *own* "illegal copying." Secondary infringement principles are both inapt and inadequate in these situations. Such commercial infringers are directly liable, regardless of whether the conduct of their customers is infringing or

noninfringing. The same is true when Cablevision copies and transmits unlicensed programming to its paying subscribers.

II. The Second Circuit Drastically Narrowed the Reproduction Right.

A. Permanent Copies

To justify its conclusion that Cablevision does not directly infringe the reproduction right, the Second Circuit excluded as irrelevant all of "Cablevision's conduct in designing, housing, and maintaining a system that exists only to produce a copy," and held that Cablevision would be directly liable *only* if a "human employee" committed "volitional conduct" when a specific program was chosen for unlicensed copying. Pet. App. 20a, 22a. That rule conflicts with *New York Times Co. v. Tasini*, 533 U.S. 483 (2001), other authorities, and common sense. It insulates every automated service from direct liability, and thus presumes that copyrights in the digital age are protected solely by secondary liability, which requires proof of predicate acts of infringement by customers.

To disguise the conflict with *Tasini*, Cablevision mischaracterizes that case as being solely about copying articles *into* automated databases, not about making copies *from* the databases when requested by users. Opp. 17. In fact, *Tasini* held that the database operators directly infringed by "selling copies of the Articles." 533 U.S. at 504. The "copies" sold were, of course, those automatically created in response to user requests – not the source copies stored in the databases. That is consistent with the

Court's emphasis throughout on unlicensed copying *and* distribution. *E.g.*, *id.* at 503-04, 506. The Court even analogized the database operators to automated versions of a library where, "[i]n response to patron requests, an inhumanly speedy librarian would search the room and *provide copies of the articles* matching patron-specified criteria." *Id.* at 503 (emphasis added). The Court firmly rejected the contention that secondary liability should provide the rule of decision when a database operator automatically makes copies requested by users. *Id.* at 506.

Thus, *Tasini* held the database operators *directly* liable for doing what Cablevision does here. While *Tasini* did not belabor the point, that hardly justifies Cablevision's insinuation that the Court's words were ill-considered or careless. The Court was succinct because the answer was clear. And the Second Circuit's decision conflicts directly with *Tasini* on this point. To the extent *Tasini* is open to the misinterpretation Cablevision advances, or is simply being ignored (as in the decision below), that reinforces the need for review.

The Second Circuit's "volition" principle also conflicts with the settled rule that both a business *and* its customers can be direct infringers. Pet. 19 n.4; Opp. 15 n.4 (acknowledging rule). The Second Circuit treated direct infringement as an either/or issue, reasoning that Cablevision could not be "doing" the copying if Cablevision's customers were. *E.g.*, Pet. App. 23a-24a (reasoning that Cablevision's

conduct does not "*displace* the customer as *the person* who 'makes' the copies") (emphasis added).

Nor can the Second Circuit's "volition" requirement be reconciled with the broad statutory language "to do and to authorize." 17 U.S.C. § 106.[3] Even if that language excludes purely involuntary or incidental copying of the kind at issue in *Netcom*, there is nothing involuntary or incidental about what Cablevision does. And there is certainly no statutory basis for requiring the particular kind of "volition" demanded by the Second Circuit, which turns on whether a human employee selects the specific works to be copied at any given time.

The Second Circuit's ruling amounts to a robot exception to direct liability for commercial copying services that deploy computers in place of human employees, and a presumption that such conduct must always be analyzed under principles of secondary liability. The sweeping scope of that ruling, and the conflict with *Tasini*, necessitate review.

B. Buffering

Denying a circuit split concerning buffer copies, Cablevision incorrectly contends that *MAI* and its

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[3] Cablevision incorrectly asserts that Petitioners cannot cite the "to authorize" language in § 106. Petitioners have always argued that Cablevision is directly liable under § 106. To elaborate that argument, Petitioners may refer to the entire language of the section. Cablevision's further argument that "to authorize" pertains *solely* to secondary liability is contrary to *Tasini*, 533 U.S. at 498.

progeny decided only that temporary reproductions in computer memory *may* be "fixed." Opp. 25-26. But the Ninth Circuit adopted and applied a test for *when* such reproductions are fixed: a copy is fixed if it is embodied in computer memory long enough to be perceived, reproduced or otherwise communicated. *MAI Sys. Corp. v Peak Computer, Inc.*, 991 F.2d 511, 519 (9th Cir. 1993). Because Cablevision's buffer copies meet that test, the conflict is clear.[4]

Cablevision also suggests that the Copyright Office has welcomed the Second Circuit's reading. But the cited rulemaking criticizes the decision's reasoning and its failure to offer any "guidance as to when a copy might be considered to be 'embodied' for 'a period of more than transitory duration.'" *Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries*, 73 Fed. Reg. 66,173, 66,177 (Nov. 7, 2008).

On the merits, Cablevision incorrectly argues that the functional standard employed by *MAI* and the Copyright Office reads the words "for a period of more than transitory duration" out of the statute. In fact, by recognizing that "to be perceived, reproduced or otherwise communicated for a period of more than transitory duration" applies to the work, not its embodiment, the majority test gives meaning to

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[4] Contrary to Cablevision's mischaracterization (Opp. 24-25), Petitioners' argument is not that a 1.2-second buffer satisfies the Second Circuit's separate durational requirement, but that it meets the *MAI* test – which is undisputed. *See* Pet. 31-32; Pet. App. 16a-17a.

every word in the statute, while adhering to basic grammar. *See Recent Developments* 9; H.R. Rep. No. 94-1476, at 53 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5666.

As Cablevision acknowledges, buffer copies are used in a wide range of digital services and devices. Opp. 5, 22. Thus, whatever the right reading of the statute, there is an acute need for a uniform national rule concerning the scope of the exclusive right to make "fixed" temporary copies in computer memory.

III. The Second Circuit Drastically Narrowed the Public Performance Right.

Cablevision's attempt to defend the Second Circuit's convoluted interpretation of the public performance right is also unavailing. As Cablevision concedes, the decision rests on the far-reaching rationale that a public performance occurs only if the public at-large is the "potential audience" of each *transmission* of a work's performance. Opp. 27; Pet. App. 30a.

Under that impractical and unprecedented reading, *every* commercial on-demand performance would be insulated from *all* copyright liability, both direct and indirect, on the theory that the performance is private, not public. And even when limited to services that use separate copies to generate each transmission, the combination of the Second Circuit's reproduction and public performance holdings will enable unlicensed automated services to provide copyrighted works on demand as long as they follow Cablevision's "copy-then-transmit" business model. Pet. 36-38.

Like the Second Circuit, Cablevision erases the distinction between the work's performance and a transmission of that performance, arguing that each transmission must be "generally available" to the public. Opp. 27-28. But the Act provides that the work's *performance* – not its transmission – must be communicated to the public, which may receive it at different times. 17 U.S.C. § 101. It thereby recognizes that the performance of a work may be communicated to the public via multiple transmissions, each of which is available only to the single member of the public who requested it. Likewise, the Act's treatment of on-demand performances of sound recordings demonstrates that transmissions available to only one person may be "public" – a point Cablevision ignores. *See* Pet. 34 n.7; Sony BMG Amicus Br. 14-20.

The Second Circuit's "parsing of the text of the Copyright Act is peculiar if not perverse," "confuse[s] 'performance' and 'transmission,'" "reads non simultaneous receipt out of the statute," and has "bizarre consequences." *Recent Developments* 26-27. It also conflicts with cases holding that a transmission receivable by only one or a few persons is "public." *E.g.*, *Columbia Pictures Indus., Inc. v. Redd Horne, Inc.*, 749 F.2d 154, 159 (3d Cir. 1984). Like the Second Circuit, Cablevision tries to distinguish these prior cases as involving multiple transmissions generated from a single copy. But regardless of that distinction, each *transmission* in these cases was available only to one or a couple persons and no one else. Therefore, under the interpretation defended by Cablevision, the

performances in *Redd Horne* would not be public. *E.g.*, Opp. 26 ("there still is no public performance unless *the transmission* is 'to the public'") (emphasis changed).[5]

To be sure, Cablevision, like the Second Circuit, is quick to restrict the holding below to services that use separate copies to generate transmissions to different viewers. But that limitation cannot be squared with the court's statutory reading, which focuses on the potential audience of a transmission – an inquiry that in no way depends on whether one, many, or (for a live broadcast) no copies are used to generate it. Cablevision also tacitly acknowledges that the multiple copies serve no technological function. The sole reason Cablevision makes multiple copies is – ironically – to evade the requirement for a license. Congress prohibited just such manipulations by providing that public performances can be accomplished "by means of any device or process." 17 U.S.C. § 101.

This Court has never interpreted the public performance provisions of the 1976 Act, which were adopted in large part to make clear that cable transmissions are public performances requiring licenses. *See* Pet. 38-39; MLB Amicus Br. 4-16. The Second Circuit's radical constriction of those

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[5] Cablevision's attempt to explain how the Second Circuit's reading of the transmit clause would cover VOD services (Opp. 27-28) suffers from the same fatal defect. A VOD transmission is available only to the person who requests it, which would make it non-"public" under Cablevision's reading.

provisions as they apply to on-demand performances (over cable, the Internet, or elsewhere), combined with the other serious errors and conflicts of authority in the decision below, create a compelling need for the Court to address these issues now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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